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From constituent to destituent power beyond the state

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ABSTRACT

This article engages with the concept of constituent power and its viability in times of transnational constitutionalism. After discussing systems-theoretical, procedural and sovereignist approaches, it argues that constituent power in transnational contexts has to be reframed as negative device and countervailing power. The article resurrects a line of constitutional thought which can be traced back to Machiavelli and the young Karl Marx. Here, constituent power is primarily a matter of revocatory scenarios which open up avenues for a re-negotiation of existing orders. In our contemporary world, the question resurfaces what kind of legal and political communications articulate such revocatory scenarios and exert destituent effects on existing hegemonies within transnational constitutionalism.

KEYWORDS Constituent power; constitutionalism; transnational law; democracy; Machiavelli

I. Introduction

The concept of constituent power has become an important strand of discussion in international political and legal theory.¹ The question raised is if constituent power can be transferred to the inter- and transnational sphere. At first sight, this seems to be a delicate issue. Constituent power is inextricably linked to the foundational dimension of constitution-making: a political community conceives itself as supreme power (or is retroactively construed in that vein) and establishes a mode of collective self-government in the medium of a higher-ranking legal order.² But facing the plurality of transnational legal

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¹ Nico Krisch, 'Pouvoir Constituant et Pouvoir Irritant in the Postnational Order' (2015) 14(3) *International Journal of Constitutional Law* 657; Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (Oxford University Press, 2007); Alexander Somek, 'Constituent Power in National and Transnational Contexts' (2012) *Transnational Legal Theory* 3(1) 31; Chris Thornhill, 'A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions' (2013) 20(2) *Indiana Journal of Global Legal Studies* 551; Mark Wenman, *Agonistic Democracy. Constituent Power in the Era of Globalization* (Cambridge University Press, 2013).

² For similar definitions, cf Martin Loughlin, 'The Concept of Constituent Power' (2014) 13(2) *European Journal of Political Theory* 218; Christoph Möllers, 'Verfassungsgebende Gewalt – Verfassung –

regimes and political communities in our contemporary world, an equivalent to a common foundational 'will', which, in the seminal words of the Abbé Sieyès, constitutes itself 'independent' from 'all forms and conditions', is difficult to discern.³ Furthermore, the holistic concomitants of constituent power (reminiscent of Catholic canon law) may be a dubious starting point for a revival on the transnational level.⁴ At first sight, it could seem more promising to address the normative challenges of the transnational sphere through rights-based accounts or simply the rule of law which are more apt to be fully internalised in a coherent legal system without appealing to *the* nation or *the* people.⁵

The growing interest in the role of constituent power is driven by a certain discomfort with the democratic deficits and technocratic bias of transnational constitutionalism. Under a variety of labels such as 'new constitutionalism',⁶ 'imperial global state in the making'⁷ or 'post-democratic executive federalism',⁸ it is indicated that transnational constitutionalism operates as a self-serving device for political and economic elites or functional social systems. In this perspective, transnational constitutionalism seals itself off from democratic legitimacy chains and, indeed, lacks a meaningful connection to constituent power.

More specifically, two tendencies are held responsible for inducing hegemonic effects. The *first tendency* is a procedural usurpation of constituent power. The paradigmatic examples range from political decisionism of powerful states and practices of external constitutionalisation (eg, where Western lawyers implement and even write constitutional texts for countries of the global south) to the observation of a nascent global juristocracy.⁹ In these

Konstitutionalisierung' in Armin von Bogdandy and Jürgen Bast (eds), *Europäisches Verfassungsrecht* (Springer, 2009) 227–77, 238; Niklas Luhmann, 'Die Verfassung als evolutionäre Errungenschaft' (1990) 9(1) *Rechtshistorisches Journal* 176, 180.

³ Emmanuel-Joseph Sieyès, *Qu'est-ce que c'est le Tiers état?* (Editions du Boucher, 2002) 55; and cf for the observation of transnational legal pluralism: Peer Zumbansen, 'Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order' (2012) 1(1) *Global Constitutionalism* 16; Lars Viellechner, 'Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law' (2015) 6(2) *Transnational Legal Theory* 312; cf for the 'topological dimension' of emerging transnational law: Sabine Müller-Mall, *Legal Spaces. Towards a Topological Thinking of Law* (Springer, 2013).

⁴ Brunkhorst discusses the connection to canon law at length in: Hauke Brunkhorst, *Critical Theory of Legal Revolutions* (Bloomsbury Academic, 2014) 90 ff. drawing inter alia on Berman's seminal study: HJ Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Harvard University Press, 1983).

⁵ David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2012) 1(2) *Global Constitutionalism* 229; see also Catherine Colliot-Thélène, *La Démocratie sans Démos* (Presses Universitaires de France, 2011).

⁶ Stephen Gill and Claire A Cutler (eds), *New Constitutionalism and World Order* (Cambridge University Press, 2014).

⁷ Bhupinder Singh Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15(1) *European Journal of International Law* 1.

⁸ Jürgen Habermas, *Zur Verfassung Europas* (Suhrkamp, 2011) 48 ff.

⁹ Jean L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press, 2012) 268; Philipp Dann, 'The Internationalization of the Constituent Power of the Nation' in Hauke Brunkhorst (ed), *Demokratie in der Weltgesellschaft* (Nomos, 2009) 491; Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard

cases, already constituted powers, such as courts or executive branches, usurp constituent competences without providing the necessary democratic legitimation. The *second tendency* consists in the constitutionalisation of hegemonic projects on substantive grounds. Transnational legal scholarship and the International Political Economy (IPE) both emphasise the role of political projects which are inscribed in the higher-ranking legal orders.¹⁰ The most pressing examples stem from the transnational economy. Here, neoliberal policies were dignified as higher-ranking commitments in the respective agreements and jurisdictions. In spite of all plurality, most of the institutions and regulations are biased towards free trade and a liberal notion of private property.¹¹ This severely restricts the available policy-options in the regular political process on all levels of political decision-making and tends to undermine democratic self-legislation.

The obvious avenue for contesting these tendencies consists in the evocation of a foundational power which, possibly, reinserts the necessary irritation of hegemonic projects.¹² Contrary to be suspected of obsolescence, a reframed conception of constituent power should throw the aforementioned deficits into sharp relief. Thereby, it should become possible to identify apparent legitimacy gaps as well as democratic and substantive shortcomings. Nevertheless, it remains an open question how to conceive of constituent power beyond the state while its inherited point of reference is absent: a clearly demarcated people on a given territory.¹³

University Press, 2007); Markus Patberg, *Usurpation und Autorisierung. Konstituierende Gewalt im globalen Zeitalter* (Dissertation, 2016); Christian Volk, 'Why Global Constitutionalism does not live up to its Promises' (2013) 4(2) *Goettingen Journal of International Law* 551; for a more optimistic approach to transnational courts cf Jochen von Bernstorff, 'Hans Kelsen on Judicial Law-Making by International Courts and Tribunals: A Theory of Global Judicial Imperialism?' (2015) 14(1) *The Law & Practice of International Courts and Tribunals* 35.

¹⁰ Stephen Gill and Claire A Cutler (eds), *New Constitutionalism and World Order* (Cambridge University Press, 2014); Isabelle Ley, 'Opposition in International Law—Alternativity and Revisibility as Elements of a Legitimacy Concept for Public International Law' (2015) 28(04) *Leiden Journal of International Law* 717; with a view on the European Union: Mark Dawson and Floris De Witte, 'From Balance to Conflict: A New Constitution for the EU' (2016) 22(2) *European Law Journal* 204.

¹¹ Claire Cutler, 'Legal Pluralism as the "Common Sense" of Transnational Capitalism' (2013) 3(4) *Oñati Socio-Legal Series* 719; Eyal Benvenisti and George W Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60(2) *Stanford Law Review* 595.

¹² Cf Kolja Möller, *Formwandel der Verfassung. Die postdemokratische Verfasstheit des Transnationalen* (Transcript, 2015); Mark Wenman, *Agonistic Democracy. Constituent Power in the Era of Globalization* (Cambridge University Press, 2013); Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, 1999); Peter Niesen, Svenja Ahlhaus and Markus Patberg, 'Konstituierende Autorität. Ein Grundbegriff für die Internationale Politische Theorie' (2015) 6(2) *Zeitschrift für politische Theorie* 159.

¹³ The question who constitutes and belongs to the people has always been a complex issue. But even if we reject cultural or historical commonalities as a viable criterion for peoplehood and restrain ourselves to a purely 'legalistic' Kantian understanding of the people as an association of legal subjects, we encounter this tension. Let us revisit Kant's definition from his 'Anthropology'. Here, Kant argued that the people should be understood as follows:

By the word people (populus) is meant a multitude of human beings united in a region, in so far as they constitute a whole. This multitude, or even the part of it that recognizes itself as

In this article, I discuss some of the problems that come along with the transfer of constituent power to the transnational sphere. Both on a conceptual level and with regard to transnational contexts, I will argue that we should conceive of constituent power as ‘destituent power’. This negative twist reinvigorates a particular trait in the reasoning on constituent power, which can be traced back to the political theory of Machiavelli and the young Karl Marx.¹⁴ As I will show, this line of thought provides ample resources for the critique of existing hegemonies within transnational constitutionalism.

The argument proceeds in three steps: in the *first part*, I relocate the role of the people. A promising starting point can be found in recent constitutional sociology. Here, the people are not seen as a unitary agent or collective, but simply as a communicative mechanism which assumes a peculiar function in relating the political to the legal system and vice versa.¹⁵ Constituent power amounts to a generalised mechanism of de-paradoxification which is not tied to a pre-existing political community. However, this radical move shows its weaknesses when it comes to a critique of transnational constitutionalism. It draws on an over-generalised conception which is not able to distinguish usurpatory tendencies from ‘above’, which emanate from the already constituted powers, from democratic varieties, such as counter-cycles from ‘below’.

In the *second part*, I scrutinise approaches which re-establish an explicit connection to democratic aspirations. More specifically, popular-sovereignty based and societal approaches will be discussed. Constituent power is either collapsed into a reconstructive public-law proceduralism (transnationalisation of popular sovereignty), tied to a functional reflexivity (societal constitutionalism) or identified with the ‘people’ of the nation-state (nation-state based sovereignty). In all of these cases, it remains an open question how to cope with the interplay of procedural usurpation and substantive-hegemonic overdetermination.

united into a civil whole through common ancestry, is called a nation (gens).

Immanuel Kant, ‘Anthropology from a Pragmatic Point of View (1798)’ Robert B Louden (ed) (Cambridge University Press, 2006) 213.

While the legal dimension of the nation is crucial to Kant’s understanding, he still refers to a determinate territory and the reference to the constitution of a ‘whole’. Without going into detail of these problems, it is obvious that transnational constitutionalism and its fragmented characteristics make it necessary rethink the conception of peoplehood.

¹⁴ From a vulgar perspective on the works of Machiavelli, which considers him to be the inventor of immoral realism, this may seem astonishing. However, the relation of Machiavelli to the young Marx and the use Machiavelli’s work as a resource to conceptualise constitutional issues has become an important area of research. See Miguel Abensour, *Democracy Against the State: Marx and the Machiavellian Moment* (Polity Press, 2011); John P McCormick, *Machiavellian Democracy* (Cambridge University Press, 2011); Miguel Vatter, *Between Form and Event. Machiavelli’s Theory of Political Freedom* (Fordham University Press, 2014).

¹⁵ Cf Chris Thornhill, ‘Contemporary Constitutionalism and the Dialectic of Constituent Power’ (2012) 1(03) *Global Constitutionalism* 369; Gunther Teubner, ‘The Project of Constitutional Sociology: Irritating Nation State Constitutionalism’ (2013) 4(1) *Transnational Legal Theory* 44.

Finally, in the *third part*, I delineate another option: to reconstruct constituent power as a negative device. By revisiting a line of thought which goes back to Machiavelli and Marx, it is argued that constituent power is expressed through revocatory scenarios which open up avenues for a re-negotiation of existing orders.

II. Constituent power as functional device

Constituent power has found a variety of historical expressions and usages. It is a category of constitutional law that evolved over centuries and it plays an important role in political life.¹⁶ Political leaders and movements appeal to ‘we-the-people’. They bolster their respective interests by invoking the foundational dimension of the political community.¹⁷ Even in the heartland of constituent power, France, Abbé Sieyès’ seminal invocation of ‘*la nation*’ during the French revolution was interpreted in multiple ways.¹⁸ It has always been a controversial issue how the nation could be represented or embodied, who belonged to the French people or what the defining criterion was. From the outset, it remained an open question if constituent power belonged to nobody and was curtailed to a figure of purely legal imagination, or if it belonged to everybody in a fluent ‘*plébiscite de tous les jours*’¹⁹ on the societal plane or if it was defined by a group of enlightened representatives and political activists.

Constitutional sociology has made a strong contribution in elucidating this oscillation. According to Gunther Teubner, Niklas Luhmann and Chris Thornhill, a closer look at the intersection of social evolution and constitutional semantics reveals that it would be completely misguided to simply call for normative clarification.²⁰ They argue that the flashy talk about ‘we-the-people’ or ‘*la nation*’ overplays that constituent power served as a functional mechanism, which unleashed the evolution of the legal and political system in modern societies. By drawing on constituent power, it was possible to externalise the respective foundational paradoxes in law and politics and, thereby, to conceal the paradoxical ground on which both systems are residing.

¹⁶ Martin Loughlin, ‘The Concept of Constituent Power’ (2014) 13(2) *European Journal of Political Theory* 218; Andreas Kalyvas, ‘Popular Sovereignty, Democracy, and the Constituent Power’ (2005) 12(2) *Constitutions* 224; Josef Isensee, *Das Volk als Grund der Verfassung. Mythos und Relevanz der Lehre von der verfassungsgebenden Gewalt* (Westdeutscher Verlag, 1995).

¹⁷ See Bruce Ackerman, ‘Constitutional Politics/Constitutional Law’ (1989) 99(3) *Yale Law Journal* 453.

¹⁸ For a thorough investigation of the French case, cf Pierre Rosanvallon, *Le Peuple Introuvable. Histoire de la Représentation Démocratique en France* (Gallimard, 1998); for the Anglo-Saxon tradition, cf Edmund S Morgen, *Inventing the People. The Rise of Popular Sovereignty in England and America* (Norton & Company, 1988).

¹⁹ Ernest Renan, *Qu’est-ce que c’est une nation?* (Calmann Lévy, 1882) 27.

²⁰ Niklas Luhmann, ‘Die Verfassung als evolutionäre Errungenschaft’ (1990) 9(1) *Rechtshistorisches Journal* 176; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012); Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge University Press, 2011).

From a systems theory perspective, law and politics are grounded in self-referential communications which revolve around binary codings:²¹ law/unlawful in the case of the legal system and power-superiority/power-inferiority in the case of the political system. If we inquire further into the self-reference of these codes, we encounter the problem of authorisation and, most notably, the 'foundational paradox' in both systems.²² By foundational paradox, we have to understand the following: it is unclear if the establishment of the code was itself lawful or unlawful or can be regarded as an expression of power-superiority or power-inferiority. These paradoxical grounds provoke a certain twilight. On the one hand, social systems invent mechanisms to conceal their paradoxical origins and to stage themselves as necessary and viable. On the other hand, they can explicitly use the paradoxical basic structure to adapt themselves in a changing social environment and to revise what counts as 'lawful' or 'power-superior'.

Since constituent power is concerned with authorisation, it shows a direct connection to the foundational paradox. More specifically, law and politics externalise their respective foundational paradoxes by dint of constituent power. From the perspective of the legal system, the establishment of the code law/unlawful is traced back to a political founding act that is (at least partly) external to the constituted powers of law. However, this externalisation shows an inverted direction as well. From the perspective of the political system, the establishment of its code (power-superiority/power-inferiority) is relegated to be a legal construction which inhibits excesses of political power and relegates its foundation to the legal system. To put it in the words of Gunther Teubner:

Law externalises its paradox towards politics with the aid of the state constitution. (...) The constitution commits politically unconstrained sovereignty to the process of the law. The state constitution, as a structural coupling between the law and politics, is thus characterised by the fact that there is a reciprocal externalisation of the original paradoxes of politics and law.²³

Hence, it is not a surprise that constituent power has always oscillated between legalistic approaches, which consider constituent power to be only a concern in the reconstructive reasoning of courts, and being a deeply political issue, which cannot be fully internalised into the legal order. The bifurcation of internalistic-legal and political-decisionistic

²¹ Niklas Luhmann, *Soziale Systeme. Grundriß einer allgemeinen Theorie* (Suhrkamp, 1984) 242 ff.

²² For an inquiry into the role of paradox in systems theory, cf Urs Stäheli, 'Politik der Entparadoxierung. Zur Artikulation von Hegemonie- und Systemtheorie' in O Marchart (ed), *Das Undarstellbare der Politik. Zur Hegemonietheorie Ernesto Laclaus* (Turia+Kant, 1998) 52–66, 58 ff; see also Phillip Paiement, 'Paradox and Legitimacy in Transnational Legal Pluralism' (2013) 4(2) *Transnational Legal Theory* 197.

²³ Gunther Teubner, 'Exogenous Self-binding: How Social Systems Externalise Their Foundational Paradox in the Process of Constitutionalisation' in Alberto Febbrajo and Giancarlo Corsi (eds), *Sociology of Constitutions: A Paradoxical Perspective* (Routledge, 2016) 30–48, 3 (in the manuscript).

approaches²⁴ to constituent power is not a matter of theory alone, it is rooted in the reciprocal externalisation of the respective foundational paradoxes.

Echoing these insights, Chris Thornhill has furthered a functionalistic approach to constituent power beyond the state.²⁵ According to Thornhill, the most important function of constituent power must be located in its contribution to constitute and spread political power throughout society. It animated a double movement of concomitant expansion and limitation. By invoking constituent power 'the state accounted for itself as normatively willed by the people' while it limited its reach by construing its citizenry simultaneously as bearers of rights.²⁶ Thus, it was possible for the state to restrict the coverage of exercising political power and, at the same time, to claim supreme political authority.

Bearing in mind this functional generalisation of constituent power, Thornhill de-dramatises the role of constituent power in transnational constitutionalism. The strong role of courts, rights and the judicial sphere may not announce the end of constituent power or indicate democratic deficits because constituent power has always been a functional construction, which oscillated between subjective rights claims and state power. He identifies not a decay, but solely a reconfiguration: 'In the transnational constitution, therefore, the original nexus between rights and constituent power is reconfigured as a principle that continues to support the social differentiation and transfusion of political power.'²⁷ Though Thornhill observes the retreat of foundational constitutionalism in favour of rights-based accounts, he does not identify a severe contradiction to the inherited notion of juridico-political structures. Constitutionalism's central function to 'support functional differentiation' and 'transfuse political power' is simply reconfigured.

The merit of such a sober socio-theoretical perspective on constituent power lies at hand. It is able to generalise and re-specify constituent power, even under conditions where a national political community is absent and, to cite Luhmann's polemics about normative constitutionalism, 'ceremonial declarations' and 'illusions of possibility' are lacking.²⁸ But if constituent power is regarded as a communicative strategy of already constituted systems to cope with their foundational paradoxes, it covers a vast range of phenomena. The travelling activities of Western constitutional lawyers (external constitutionalisation), the decision-making of the UN Security Council, the invocation of constituent 'human rights' by international courts, as well as the self-description of nation-

²⁴ See the distinctions in: Martin Loughlin, 'The Concept of Constituent Power' (2014) 13(2) *European Journal of Political Theory* 218.

²⁵ Chris Thornhill, 'A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions' (2013) 20(2) *Indiana Journal of Global Legal Studies* 551; Chris Thornhill, 'Contemporary Constitutionalism and the Dialectic of Constituent Power' (2012) 1(03) *Global Constitutionalism* 369.

²⁶ Thornhill, 'Contemporary Constitutionalism and the Dialectic of Constituent Power' (n 26) 384.

²⁷ *Ibid*, 393.

²⁸ Niklas Luhmann, 'Die Verfassung als evolutionäre Errungenschaft' (1990) 9(1) *Rechtshistorisches Journal* 176, 184.

states as ‘masters of international treaties’ can all be reconstructed as taking part in an internationalised *pouvoir constituant*.

This line of thought, obviously, loses a central aspect of constituent power out of sight. At least in its democratic variety, the notion of constituent power served those subjected to constituted powers as a device to revoke the existing juridico-political forms or to pose a threat to the existing order.²⁹ Constituent power does not only help the systems to aggregate power, but as a point of reference for countervailing the power of the system from ‘below’.³⁰ From a functionalistic standpoint, however, it becomes impossible to discern the usurpation of constituent power from ‘above’ and democratic variants.

III. Constituent power and democratisation

It does not seem apt to restrict constituent power to a mere strategy of de-paradoxifying constituted powers. Indeed, the appeal to the ‘We-the-people’ plays a vital role in social and political conflicts. This even resonates in the inter and transnational realm. Social movements and publics regularly invoke constituent power.³¹ From the call for ‘*democracia real*’ in the European South to the Anti-G8-Protests and refugee-movements, the message radiates: we are the ‘true’ constituent power on which your constituted powers are built. One may dismiss such claims as a sort of ‘populist’ category mistake, which overburdens normal politics with a constitutional dimension.³² Nevertheless, constituent power is regularly a point of reference when constituted powers are suspected of not expressing the original will of the people.³³ In the following section, I will scrutinise different theoretical approaches which establish a link between constituent power and claims for democratisation. More specifically, I am interested in their respective potential to challenge existing hegemonies within transnational constitutionalism.

1. Transnationalisation of popular sovereignty: towards *pouvoir constituant mixte*?

A first approach can be identified in the prospects for the transnationalisation of popular sovereignty. In recent years, a whole strand of international

²⁹ Here, I allude to a line of thought that can be traced back to Machiavelli and Marx. It emphasises the contestatory dimension of constituent power and will be discussed at length in the third part of the article. For a holistic approach that draws on the constructive, political moment of constituent power to institute a new order, cf. Andreas Kalyvas, ‘Popular Sovereignty, Democracy, and the Constituent Power’ (2005) 12(2) *Constellations* 224; for the counter-hegemonic repatriation of constituent power to the forces of living labor, cf. Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, 1999). Cf. in a similar vein: Martin Loughlin, ‘The Concept of Constituent Power’ (2014) 13(2) *European Journal of Political Theory* 218, 233 ff.

³¹ Saki Bailey and Ugo Mattei, ‘Social Movements as Constituent Power: The Italian Struggle for the Commons’ (2013) 20(2) *Indiana Journal of Global Legal Studies* 965.

³² Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Harvard University Press, 2014) 128 ff.

³³ Bruce Ackerman, *We the People 2. Transformations* (The Belknap Press of Harvard University Press, 1998); Paulina Ochoa Espejo, *The Time of Popular Sovereignty. Process and the Democratic State* (Penn State University Press, 2011).

political and legal theory has highlighted a more process-oriented and deliberative account of popular sovereignty.³⁴ In the light of cross-border affectedness, the universality of human rights and new types of competence distribution, it is argued that the traditional understanding of popular sovereignty, which locates constituent power in national people, needs to be revised. Traditionally, the focus was on foundational moments in constitutional history where the people of popular sovereignty were (in most of the cases, retroactively) staged as the nation. But supra and transnational modes of ordering make the picture more complex. The basic democratic normativity that those affected by laws should have the possibility to regard themselves as their authors (identity-thesis) must be related to super and transnational forms of law-making and social interconnections. Different communities are differently affected by national, international and transnational legalisation and those affected are not simply citizens, but also entities such as states or corporate agents. The basic normativity of popular sovereignty represents a tool in order to assess already existing institutions and treaty-systems with a view to their legitimation by those affected. The notion of the people is decentred, pluralised and partly decoupled from the inherited versions of national peoplehood. It is distributed through a more plural notion of *demoi* and public spheres.³⁵

This has inspired a conception of *pouvoir constituant mixte*, of mixed constituent power. Originally developed in international law discourse and then espoused in his recent work by Jürgen Habermas, constituent power amounts to a dualistic model of authorisation.³⁶ The exemplary case is the European Union. It is argued that the existing treaties and institutions already embody a dualistic legitimation structure. The member states and their governments (represented in the European Council) as well as the European Citizenry (represented in the European Parliament) must be considered as sharing constituent authority. At first sight, this seems to be a plausible interpretation which sheds light on the institutional balance between the Council and the Parliament. But if we move from the already established dualistic relation of constituted powers to the assumed dualistic initial authorisation, the argument undergoes a reconstructive twist.³⁷

The dualistic mode of authorisation emanates from a rational reconstruction of European integration.³⁸ By a rational reconstruction, we have to

³⁴ Cf David Held, *Democracy and the Global Order. From the Modern State to Cosmopolitan Governance* (Polity Press, 1995); Andreas Niederberger, *Demokratie unter Bedingungen der Weltgesellschaft?* (de Gruyter, 2009) 405 ff.

³⁵ Cf James Bohman, *Democracy Across Borders. From Demos to Demoi* (MIT Press, 2007).

³⁶ Jürgen Habermas, *Zur Verfassung Europas* (Suhrkamp, 2011) 67 ff. This dualistic model is extensively elaborated in: Peter Niesen, 'Der Pouvoir Constituant Mixte als Theorie der Föderation' in Eva-Marlene Hausteiner (ed), *Föderalismen Traditionen und Modelle jenseits des Bundesstaates* (Nomos, 2016) 209–34; Markus Patberg, 'Usurpation und Autorisierung. Konstituierende Gewalt im globalen Zeitalter' (unpublished PhD thesis, University of Hamburg, 2016).

³⁷ Jürgen Habermas, *Zur Verfassung Europas* (Suhrkamp, 2011) 67 ff.

³⁸ Cf Daniel Gaus, 'Rational Reconstruction as a Method of Political Theory Between Social Critique and Empirical Political Science' (2013) 20(4) *Constellations* 553.

understand a method ‘to identify particles and fragments of “existing reason” in social practices’ which already exist.³⁹ The overall project does not consist in designing a future constitution for Europe. Habermas just wants to ‘acknowledge the democratic character of the form already assumed by the European Union as a result of the Treaty of Lisbon’.⁴⁰ The treaties embrace a dualistic structure of initial legitimation to the extent that they combine two levels of polity formation. The role of the member states can be traced back to the authorisation by the respective national people, while the role of the European Parliament and emerging varieties of European Citizenship refer to the European citizenry in its entirety. The former can be reconstructed as authors of the national constitutions, the latter as authors of the European layer. The individual participates simultaneously on both levels in the process of polity formation.

The question is not if a political founding act, where constituent power plays actually out, is identifiable. Rather, we have to engage in a scenario of hypothetical founding and ask if we, as hypothetical founders of this supranational polity in a rational discourse, would have established a similar constitutional structure.⁴¹ This can be done for most of the national democratic constitutions notwithstanding if they were established through a democratic foundational act or through the international community. We can retroactively conceive of them as normatively willed by the people. The rational reconstruction transforms constituent power to a procedural and retroactive reasoning which migrates in the head of the citizens. Then, it is possible to make a democratic variety of constituent authority explicit if this is possible (this is the case with the existing European treaties). Or a rational reconstruction can prospectively set benchmarks for further steps in democratising inter and transnational polity formation and overcoming legitimacy deficits where it is needed.

It is clear from the outset that the *pouvoir constituant mixte* highlights a transnationalisation of public law proceduralism. The hegemonic traits of transnational constitutionalism should be confronted with the need for democratic authorisation, legitimation of public powers and the assertion of public control over important social fields such as economic transactions. This comes along with a specific diagnosis on the hegemonic traits of transnational constitutionalism. The main focus is the procedural usurpation of constituent power by powerful actors. A prerogative of public law and democratic legitimation should counter these tendencies.

³⁹ Markus Patberg, ‘Supranational Constitutional Politics and the Method of Rational Reconstruction’ (2014) 40(6) *Philosophy & Social Criticism* 501, 513.

⁴⁰ Jürgen Habermas, *The Crisis of the European Union. A Response* (Polity Press, 2012) 21.

⁴¹ *Ibid.*, 30; Markus Patberg, ‘Supranational Constitutional Politics and the Method of Rational Reconstruction’ (2014) 40(6) *Philosophy & Social Criticism* 501, 514 ff.

But it remains an open question if this emphasis on impartial legal procedures can adequately react to the second tendency, the substantive inscription of hegemonic projects. Let us imagine that citizens engage in a rational reconstruction of their political and legal status. They conclude that they would have made the same democratic national constitution which they already have, they assess the legitimacy of transnational constitutionalisation according to democratic standards. Consequently, they introduce, where and when necessary, reform steps which close the arising legitimacy gaps. They strengthen parliamentary representation vis-à-vis the executive, invent new mechanisms of judicial review and accountability, etc. But even if all these procedural exercises are accomplished, the substantive overdetermination (eg, with regard to economic and fiscal policies) persists. Although the conditions for a critique of transnational constitutionalism may be improved, the severe constraints on the available policy-options are not necessarily touched.

Interestingly, it was the discussion about the Euro-crisis and the conflict with the anti-austerity forces in southern Europe, which revealed both the potential and the limits of such procedural accounts.⁴² For the Greek government, it was possible to start the symbolic mobilisation of ‘we-the-people’ against the Euro-group and the Troika and invoke ‘the people’,⁴³ but at the end of the day, it was also clear that the appeal to constituent power had only little power. Toppled by the Euro-group and Germany, it became obvious that a merely procedural account of popular sovereignty was powerless. The overall blockade did not emanate solely from lacking procedural devices, but from hegemonic relations and substantive asymmetries in the European market.

2. Transnational societal constitutionalism

After revealing some problems of *pouvoir constituant mixte*, I turn to a discussion of societal constitutionalism’s attempt to reframe constituent power. In the work of recent critical systems theory approaches, the framework of systems theory is used with a normative intent.⁴⁴ This strand of theoretical reasoning highlights a fundamental change in conceptualising constituent power. Since transnational constitutionalisation must be portrayed as incremental or capillary, being rooted beyond the political system, the demand for democratisation shifts its terrain.⁴⁵ It cannot and, indeed, should not,

⁴² See for an analysis: Jonathan White, ‘Emergency Europe’ (2015) 63(2) *Political Studies* 300.

⁴³ Yannis Stavrakakis, ‘The Return of “the People”: Populism and Anti-populism in the Shadow of the European Crisis’ (2014) 21(4) *Constellations* 505.

⁴⁴ Cf Andreas Fischer-Lescano, ‘Critical Systems Theory’ (2012) 38(1) *Philosophy & Social Criticism* 3.

⁴⁵ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012) 83 ff.; for a critique, see Emiliios Christodoulidis, ‘On the Politics of Societal Constitutionalism’ (2013) 20(2) *Indiana Journal of Global Legal Studies* 629.

subordinate the heterogeneous logics of various legal regimes to the political sphere. Instead, a societal or social democracy is envisaged, which takes its starting point precisely *within* these regimes. The democratic dimension consists foremost in a perennial responsiveness to a plurality of social environments.

In order to grasp this reframing, it is useful to recall the basic distinction which animates this line of thought. According to systems theory, we have to start not from peoples, states or citizens, but from social communication flows. This is the case if the communications are recursively chained up under a common binary code such as law/unlawful in the legal system or powerful/powerless in the case of the political system.⁴⁶ However, this communicative connection can only enter the stage if it relegates all other social communications to the outside, the social environment as Luhmann coined it. Thereby, the constitutional grammar is heavily transformed, detached from the inherited language of political constitutionalism and generalised for a plurality of transnational legal regimes.

The object of such societal constitutionalism is depicted as follows: the systems and regimes tend to maximise their inherent rationality.⁴⁷ Area-specific rationalities become detached from their social environments. They create their respective 'gods',⁴⁸ which they equip with all-round problem-solving competence. The global economic regime is built around the expansionist logic of financial accumulation, the state system around the expansion of power claims in security policy, the science system generalises a type of rationality that disqualifies traditional bodies of knowledge. Regimes coagulate into 'anonymous matrices' that follow a totalising logic.⁴⁹ This figure resonates less with Luhmann's systems theory than Marx's critique of political economy, in which the productive forces of social evolution collapse into destructive forces. They destroy other societal conditions for communication or prevent them from ever emerging.⁵⁰

⁴⁶ Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (Suhrkamp, 1984) 242 ff.

⁴⁷ For a systematic account of this observation, cf Kolja Möller, 'A Critical Theory of Transnational Regimes. Creeping Managerialism and the Quest for a Destituent Power' in Kerstin Blome and others (eds), *Contested Collisions Interdisciplinary Inquiries into Norm Fragmentation in World Society* (Cambridge University Press, 2016) 255–80.

⁴⁸ Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) *Michigan Journal of International Law* 999, 1006.

⁴⁹ Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' (2006) 69(3) *The Modern Law Review* 327.

⁵⁰ This can unfold in two steps: 1. hegemonic regimes colonise their social environments by universalising their rationality; 2. however, since they in turn live off other systems' functions and their environments, 'Death by Complexity' can occur (cf Moritz Renner, 'Death by Complexity—The Crisis of Law in World Society' in Poul F Kjaer, Alberto Febbrajo and Gunther Teubner (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing, 2011) 93–112), since they cannot ensure their own reproduction.

But constitutional reflexivity can serve as a gateway to the demands of the social environments through the possibility of a ‘re-entry’.⁵¹ While no super- or meta-constitution of regimes is conceivable, it might be possible to tame the compulsion to maximise through countervailing powers:

[...] external social forces, which are not only state instruments of power, but also legal rules, and ‘civil society’ countervailing powers from other contexts, media, public discussion, spontaneous protest, intellectuals, social movements, NGOs or trade union power, etc., should apply such massive pressure on the function systems so that internal self-limitations are configured and become truly effective.⁵²

In such a hybrid setting, other social rationalities enter the stage and undermine the hegemonic urge, or so is the hope. The question is whether ‘such non-state institutions exhibit sustainable analogies to the *pouvoir constituant* within the nation-state, to the self-constitution of a collective, to democratic decision making, and to the organizational part of a political constitution in the strict sense’.⁵³ In this picture, constituent power resides neither in the nation-state, nor in the people. It is located in the ‘communicative potential’ and ‘social energy’ that nourishes and corrects systemic self-reference.⁵⁴

However, this shift runs the risk of watering down the radical dimension of constituent power. This is mainly due to the assumption that functional differentiation amounts to an evolutionary achievement that cannot and should not be revoked. Functional differentiation amounts to a normative conception which allows a plurality of social communication spheres to emerge. Every attempt to undermine this type of civil societal freedom by creating inter-systemic hierarchies or de-differentiation must be regarded as a threat. It is assumed that all too vast politicisation can also trigger a totalising dynamic, not less destructive than the regimes’ universalising urge.⁵⁵ All prospects are meant to correct functional self-reference in an immanent mode but offer hardly any space for fundamental questioning—hence, for a critique that does not only ask whether the law of the respective regime is just or whether its political constitution does justice to the general interest⁵⁶ but that also asks whether a particular regime, its law or policies are necessary at all. Thus, the countervailing powers have a relatively a clear and restricted

⁵¹ Cf Niklas Luhmann, ‘Observing Re-entries’ (1993) 16(2) *Graduate Faculty Philosophy Journal* 485.

⁵² Gunther Teubner, ‘A Constitutional Moment? The Logics of “Hitting the Bottom” in Poul F Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing, 2011) 9–51, 13.

⁵³ Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012) 8.

⁵⁴ *Ibid.*, 63.

⁵⁵ *Ibid.*, 86 ff.

⁵⁶ This point refers to the contingency formula of the respective functional system; with regard to the political system, cf Niklas Luhmann, *Die Politik der Gesellschaft* (Suhrkamp, 2002) 118 ff.; with regard to the law, cf Guilherme Leite Goncalves, *Il Rifugio delle Aspettative. Saggio sulla Certezza del Diritto* (Pensa Multimedia, 2013).

task. They should block colonising effects on the social environments and thereby allow functional differentiation to play out its normative potential.

What seems unattractive and even dangerous is to question legal regimes fundamentally or to revoke them. With regard to the economic constitution, for example, the abandoning of economic growth is rejected as potentially de-differentiating. Criticism should only attack ‘self-destructive growth-excesses’, since ‘a functioning monetised economy is reliant on a certain compulsion to grow’.⁵⁷ What becomes discernible here is that the hybrid constitutionalisation and the role of constituent power as social energy are not meant to revoke the respective regime. It cannot revoke it, because this would undermine the evolutionary course of functional differentiation as a sort of ‘fall of mankind’ (evolutionary argument). And constituent power may not revoke, because this falls prey to de-differentiation (normative argument). There is a creeping danger in the outlooks of societal constitutionalism that the subversive moment of constituent power collapses into a ‘construction of respect’.⁵⁸ But concomitantly, there seems to be the option of understanding the envisaged hybrid constitutionalisation in a more radical sense. Then, the regime’s inherent democratic moments depend on the existence of a point of disrespect that can revoke even the differentiation processes. This would be the re-entry of the critique of systems within the systems.

3. Nation-state based popular sovereignty

The abyss between constituent power’s democratic credentials and transnational constitutionalism inspires the third strand of reasoning that defends the inherited variety of foundational constitutionalism on the nation-state level.⁵⁹ It is argued that legitimate law must necessarily be the outcome of democratic procedures, and, most importantly, of a legislative process. In the words of Ingeborg Maus, a German legal theorist who provides a poignant critique of transnational constitutionalism: only ‘the sovereign people (direct or represented)’ has the legislative power and ‘disposes over the decision-making process’.⁶⁰ The self-referential rule-making in the transnational sphere, which can no longer be traced back to popular sovereignty, is

⁵⁷ Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 54) 99.

⁵⁸ This was Marx’ critique on Hegel’s corporate constitution in the nineteenth century: Karl Marx, ‘Kritik des Hegelschen Staatsrechts (1843)’ in *Marx-Engels-Werke Band 1* (Dietz-Verlag, 1972) 203–333, 288 ff.

⁵⁹ Ingeborg Maus, ‘Verfassung oder Vertrag. Zur Verrechtlichung globaler Politik’ in Benjamin Herborn and Peter Niesen (eds), *Anarchie der kommunikativen Freiheit Jürgen Habermas und die Theorie der internationalen Politik* (Suhrkamp, 2007) 383–405; Ernst-Wolfgang Böckenförde, ‘Die Zukunft politischer Autonomie. Demokratie und Staatlichkeit im Zeichen von Globalisierung, Europäisierung und Individualisierung’ in Ernst-Wolfgang Böckenförde (ed), *Staat, Nation, Europa* (Suhrkamp, 1999) 103–26; Petra Dobner, ‘More Law, Less Democracy? Democracy and Transnational Constitutionalism’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010) 141–61; Somek, ‘Constituent Power in National and Transnational Contexts’ (n 1).

⁶⁰ Ingeborg Maus, *Über Volkssouveränität: Elemente einer Demokratietheorie* (Suhrkamp, 2011) 8.

portrayed as a dubious enterprise. Every attempt to transfer the specific concept of modern constitutionalism to world society shows an ideological misunderstanding. Maus argues that transnational legalisation cannot be regarded as law or constitutionalisation in the full sense. It represents an ideological recurrence of the '*ancien régime*' and legitimistic 'counter-revolutionary resistance'.⁶¹ The heritage of the French Revolution should be defended at sites where at least some basic democratic mechanisms are identifiable. Maus pleads for a return to the legal figure of contract in international relations. By this move, it is more likely that a 'factual feedback of transnational and global politics within democratically proceduralised decision-making processes in the nation-states is guaranteed'.⁶²

In a similar vein, Alexander Somek has stressed the huge difference between political autonomy and transnational constitutionalism.⁶³ In Somek's view, the exercise of constituent power relies on communicative freedom and a concomitant common will-formation of free and equals. But a communicative political will-formation that 'attempts to exercise joint control over what men and women perceive to be the situation of their life' seems to be absent in the transnational realm.⁶⁴ Somek concludes that 'communicative freedom does not exist in the accidentally cosmopolitan situation'.⁶⁵ This is not only a matter of theoretical construction. As he emphasises, it severely affects the actual modes of political subjectivity in the real world. While the democratic conception of constituent power animated a political subjectivity shows a peculiar volitional trait in claiming control over the common good, the modes of constitutionalisation beyond the state are intrinsically linked to an immense 'passivity' of the subject.⁶⁶ One can have recourse to different managerial languages of legal regimes, but one cannot adopt a perspective of consciously 'constituting' a political order or determining the living conditions of a given political collective.

This strand of discussion mobilises a certain normative ideal against the new form of transnational constitutionalism. It measures the (long) distance that exists among the hegemonic tendencies and a democratic conception of constituent power. But it is questionable if the social conditions for its viability do exist. The capacity of a territorially bounded conception of 'we-the-people' seems to expire when the articulation of social forms, such as the economy,

⁶¹ Ingeborg Maus, 'Verfassung und Verfassungsgebung. Zur Kritik des Theorems einer "Emergenz" supranationaler und transnationaler Verfassungen' in Regina Kreide and Andreas Niederberger (eds), *Staatliche Souveränität und transnationales Recht* (Hamp 2010) 27–70, 29, 30.

⁶² Ingeborg Maus, 'Verfassung oder Vertrag. Zur Verrechtlichung globaler Politik' in Benjamin Herboth and Peter Niesen (eds), *Anarchie der kommunikativen Freiheit Jürgen Habermas und die Theorie der internationalen Politik* (Suhrkamp, 2007) 383–405, 381.

⁶³ Somek, 'Constituent Power in National and Transnational Contexts' (n 1).

⁶⁴ *Ibid.*, 48.

⁶⁵ *Ibid.*, 59.

⁶⁶ *Ibid.*, 40.

law and politics, is structurally transformed. Most importantly, it becomes increasingly difficult to provide for the democratic control of social processes at the national level, and it remains an open question as to whether state-based self-determination can do anything to oppose transnational functional systems.

In many ways, the state and, at the very least, some of its apparatuses, are often part of transnational regimes. We should not neglect the fact that the hegemonic tendencies are observable at the national level itself. The passage to transnational constitutionalism embraces even nation-state constitutionalism and re-forms it to a certain extent. While the post-war constitutionalism in the Atlantic sphere entailed social rights, openness to different economic policies and the claim to spread democracy across other societal institutions,⁶⁷ the new transnational constitutionalism exerts pressures towards a 'competition state'.⁶⁸ It is not surprising that, even at the nation-state level, market-liberal policies enter the constitutional realm.⁶⁹

Contrary to this observation, the demand for restoring national sovereignty still assumes a persisting democratic welfare state. The return to a contract- and treaty-based international system can only be justified if the nation state is still able to implement the results of democratic procedures. But it is embedded in a transnational economy that preforms decision-making processes, and makes it almost impossible to find an exit without establishing new modes of economic development. The return to a treaty-style approach implicitly stresses 'unarticulated social-revolutionary consequences' because it would have to decouple the connection of world economy and inter-state competition.⁷⁰

III. Destituent power

The quest for a foundational democratic legitimation returns with huge intensity. However, proceduralist accounts run the risk of being legitimistic in ascribing democratic potentials to legal institutions without acknowledging their respective entanglement in hegemonic structures.⁷¹ Furthermore, it is an open question if procedures alone can effectively contest the constitutionalisation of selective policy objectives as higher-ranking commitments.

⁶⁷ Cf the seminal perspective on social democratic post-war constitutionalism in Wolfgang Abendroth, 'Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland (1954)' in Wolfgang Abendroth (ed), *Gesammelte Schriften Band 2* (Offizin, 2008) 338–57.

⁶⁸ Bob Jessop, *The Future of the Capitalist State* (Polity Press, 2002) 95 ff.

⁶⁹ The most recent example of this tendency is the introduction of debt-brakes within European constitutionalism. They restrain the available political options in the parliamentary process and undermine anti-cyclical fiscal policies.

⁷⁰ This is how Oliver Eberl and Florian Rödl reconstruct the relation of IPE and radical democracy; cf Oliver Eberl and Florian Rödl, 'Kritische Politische Ökonomie und radikale Demokratietheorie: Eine Begegnung auf der Suche nach der postneoliberalen Weltrechtsordnung' (2010) 43(4) *Kritische Justiz* 416, 426.

⁷¹ Cf Sérgio Costa and Guilherme Leite Gonçalves, 'The Global Constitutionalization of Human Rights: Overcoming Contemporary Injustices or Juridifying Old Asymmetries?' (2016) 64(2) *Current Sociology* 311.

In the last part of this article, I delineate another option which emphasises the negative dimension of constituent power. Historically, it was not solely connected to the foundational scenario of self-institution, but it has always been about the contestation and even the destitution of already existing constituted powers as well. By invoking constituent power those who were dominated de-legitimised the mode of rule and opened up avenues to re-negotiate the existing order. This negative twist reinvigorates a more strategic approach which emphasises an inherent contestatory logic within the concept of constituent power.

1. Negativity

This negativity has been revealed by Olivier Beaud in his reconstruction of Abbé Sieyès seminal work.⁷² Beaud stresses that Sieyès argument not only transferred constituent power to *la nation*, but it proliferated a negative ‘*pouvoir déconstituant*’ as well. In the words of Beaud: ‘*Le pouvoir constituant chez Sieyès est donc un pouvoir “déconstituant” avant d’être un pouvoir “reconstituant”*’.⁷³ With the notion of *pouvoir constituant*, Sieyès inserted ‘*un droit d’insurrection dans la théorie constitutionnelle*’.⁷⁴ But how can one make sense of this negative and destituting twist? Traditionally, the debate on constituent power has addressed this issue under the rubrum of a ‘right to revolution’, in other words, the question if the people are bound by the constitution or if the people retains the right to replace the existing constitution by a new one.⁷⁵ However, it seems useful to inquire further into such a negative reconstruction. The ‘right to revolution’ may not necessarily play out as encompassing political revolution which replaces an old constitution by a new one. This becomes an even more pressing concern in the fragmented scene of transnational constitutionalism where it lacks central site of power (such as the ‘state’) that can be the object of a unitary constitutional revolution. But one can draw on a complex contestatory logic which inherently creeps in the conception of constituent power.

⁷² Olivier Beaud, *La Puissance de l’Etat* (Presses Universitaires de France, 1994) 223 ff.

⁷³ *Ibid.*, 224. (Before being a ‘reconstituent’ power, Sieyès concept of constituent power is a ‘deconstituent’ power). Beaud presents both powers, destituent and re-constituent, as standing in a certain tension. For the emphasis on the negative aspect, see also Habermas’ discussion of the difference between the French revolution and the American revolution: Jürgen Habermas, ‘*Naturrecht und Revolution*’ in Jürgen Habermas (ed), *Theorie und Praxis Sozialphilosophische Studien* (Suhrkamp, 1972) 89–127, 94 ff. In a similar vein, Elster connects processes of constitution-making to social crisis phenomena in Jon Elster, ‘*Forces and Mechanisms in Constitution-Making Processes*’ (1995) 45(2) *Duke Law Journal* 371 ff.

⁷⁴ Olivier Beaud, *La Puissance de l’Etat* (Presses Universitaires de France, 1994) 224. (Sieyès inserts a right to insurrection in his constitutional theory).

⁷⁵ Cf Emiliós Christodoulidis, ‘Against Substitution: The Constitutional Thinking of Dissensus’ in Neil Walker and Martin Loughlin (eds), *The Paradox of Constitutionalism Constituent Power and Constitutional Form* (Oxford University Press, 2007) 189–210; Ingeborg Maus, *Über Volkssouveränität: Elemente einer Demokratietheorie* (Suhrkamp, 2011) 73 ff.

First, the aforementioned negative dimension can be embodied by revolutionary reforms. Here, social movements refer to constituent power and effectuate a fundamental revision of existing constitutionalism. They can destitute particular elements without the establishment of a new constitution. Bruce Ackerman investigated into such revolutionary reforms by drawing on the New Deal period in the 1930s. According to Ackerman, a re-negotiation of existing orders can be observed when ‘at periods of peak mobilization, victorious movements use their control over standing institutions to take actions that go well beyond normal legal authority’.⁷⁶ In the case of the New Deal, it discharged into a ‘revolutionary’ revision and reinterpretation of the existing constitutional framework. While Ackerman is mainly concerned with the constitutional tradition of the US, the model can be reformulated and transferred to the transnational sphere. Such a perspective steps beyond the application of procedural models to remedy democratic deficits. The question would be what institutions, regimes, courses of political and legal action contribute to the ‘destitution’ of hegemonies and substantive projects. This can obviously be transnational social movements. However, courts and legal and political regimes also assume the role of a destituent power when they challenge the respective biases. Against this backdrop, the collision of transnational regimes could be re-contextualised with a view to their ‘destituent’ potential. And not the least, states or alliances of states could assume a destituting role as well.

Second, we should have a closer look at a more subtle, but nevertheless important mechanism which is connected to the mere *possibility* that such destituent powers play out. Up until now, we have dealt with constitutional contestation as an actual process, be it as a matter of political revolution or revolutionary reform. But this is only one part of the picture. The investigation of destituent powers should take insights of recent research on domination and power into account.⁷⁷ Power relations between constituted powers and the ‘people’ are not a matter of actual interference alone. The whole scene is grounded in backgrounding scenarios, consisting of what A *could* do in relation to B. To be the object of a power relation or to be dominated depends on an a system’s, an agent’s or an institution’s *capacity* to interfere with other agents. Clause Offe defined these hypothetical scenarios as virtual powers where particular social groups have the potential ‘to defect from, obstruct or challenge institutional patterns and replace them with new ones’.⁷⁸ Then, destituent power is not only about an *actual* revolutionary

⁷⁶ Bruce Ackerman, *We the People 2. Transformations* (The Belknap Press of Harvard University Press, 1998) 384.

⁷⁷ Cf Philip Pettit, *Republicanism. A Theory of Freedom and Government* (Oxford University Press, 1997) 80 ff.; Philipp Schink, ‘Freedom, Control and the State’ in Andreas Niederberger and Philipp Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press, 2013) 205–32.

⁷⁸ Claus Offe, ‘Political Institutions and Social Power. Conceptual Explorations’ in Ian Shapiro, Stephen Skowronek and Daniel Galvin (eds), *Rethinking Political Institutions: The Art of the State* (New York University Press, 2006) 9–31, 21.

reform or an *actual* counter-hegemonic communication, it also establishes a peculiar *latency of revocatory scenarios* which indirectly inhibits constituted powers from carrying out their hegemonic bias.

Such backgrounding scenarios may not be restricted to scenarios from above, where powerful institutions, social systems or social groups dispose over resources and induce dominating effects by threatening their social environments. It can also take the inverted direction. Countervailing powers 'background' constituted organs when they put a hypothetical threat of revocation on constituted powers. This ultimately influences (and possibly limits) their scope of action.⁷⁹ Constituent power can be reconstructed as a communicative mechanism which allows for revocatory scenarios 'from below' and, thereby, destitutes the hegemonic urge of constituted powers. Such a reconstruction would not adhere to a revocation of transnational constitutionalism as a matter of principle. Rather, it would make a strategic use of revocatory scenarios with a view to undermine hegemonic projects *within* transnational contexts.

2. Contestation and revocatory scenarios in Machiavelli and Marx

This reasoning on constituent power has its own points of reference in the history of political and legal thought. The most influential appraisal of such mechanisms can be found in the works of Niccolò Machiavelli. Machiavelli does not primarily conceive of the people as *populus*, constituting the entirety of the population on a clearly demarcated territory. According to the Florentine thinker, it entered the historical stage as *plebs*, as counter-power, which emanated from a diverse multitude rather than from an encompassing citizenry. In the '*Il principe*' and the '*Discorsi*', Machiavelli recurrently stresses that the ruling elites only remain checked if they are confronted with countervailing powers. The elites' 'hunger for domination', their insatiable '*umori*' can only be inhibited, if they constantly fear to lose control over the polity.⁸⁰ This is why Machiavelli lauds the Roman *plebs*, its Tribune and even its tumultuous insurrections and considers them as a necessary condition for the stability of the Roman Republic. Only 'the disunion of the *plebs* and Roman senate made that republic free and powerful'.⁸¹ Further, he argues that the interaction between the official institutions and social struggles which exceed the constitutional framework lead to positive, freedom- safeguarding effects:

⁷⁹ Here, I am interested in democratic articulations of constituent power. It can be used vice versa in order to trump existing legal and constitutional constraints from 'above'. It is not surprising that both 'left' and 'right' currents have always shown interest in the concept of constituent power.

⁸⁰ Niccolò Machiavelli, *The Prince* (University of Chicago Press, 1998) 39.

⁸¹ Niccolò Machiavelli, *Discourses on Livy* (University of Chicago Press, 1996) 16.

I say that to me it appears that those who damn the tumults between the nobles and the plebs blame those things that were the first cause of keeping Rome free, and that they consider the noises and the cries that would arise in such tumults more than the good effects that they engendered. They do not consider that in every republic are two diverse humours, that of the people and that of the great, and that all the laws that are made in favour of freedom arise from their disunion (...).⁸²

This should not be interpreted as a plea for permanent insurrection. Rather, Machiavelli is interested in the backgrounding effect of such countervailing, destituent powers; the mere possibility of insurrection constitutes a threat that exerts disciplining effects on the ruling elites.

Interestingly, the young Marx located similar ambitions in the modern conception of constituent power. In his critique of Hegel's *Philosophy of Right*, Marx defends the achievements of the French Revolution against Hegel's model of a corporate constitution. While Hegel's theory subordinated society to state sovereignty, Marx espoused a democratic account on constituent power. He lauds democracy as 'the resolved riddle of all constitutions' and the 'essence of every political constitution'.⁸³

If we have a closer look at the argumentative grounds for Marx' enthusiasm, we see that he is mainly concerned with negativity. Particularly, he is interested in the way how the '*assemblée constituante*' inserts a countervailing force into the constitutional architecture.⁸⁴ In opposition to a mere praise of foundational constitutionalism, he is realistic enough to assume that constituent power is just one historically situated element of social evolution and that, in the emerging bourgeois society, it can and will not be the actual point of reference of the whole social order. However, contrary to Hegel's state sovereignty, Marx identifies a 'completely opposed concept of sovereignty'.⁸⁵ Because from now on, Marx argues, the constitution provides a backdrop against which all forms of domination can, at least potentially, be revoked. Marx uses the formula of 'a conflict of the constitution with itself' to underline this tension:

The collision between the constitution and the legislature is nothing ignore than a conflict of the constitution with itself, a contradiction in the concept of the constitution. (...) Hence it is necessarily in itself a treaty between essentially heterogeneous powers.⁸⁶

⁸² *Ibid*, cf for this aspect: Miguel Vatter, *Between Form and Event. Machiavelli's Theory of Political Freedom* (Fordham University Press, 2014) 102 ff.; John P McCormick, *Machiavellian Democracy* (Cambridge University Press, 2011).

⁸³ Karl Marx, 'Kritik des Hegelschen Staatsrechts (1843)' in *Marx-Engels-Werke Band 1* (Dietz-Verlag, 1972) 203–333, 231.

⁸⁴ *Ibid*, 260.

⁸⁵ *Ibid*, 230.

⁸⁶ *Ibid*, 260. In this passage of the 'Kritik des Hegelschen Staatsrechts' Marx identifies constituent power (the '*assemblée constituante*') with the legislature.

In that perspective, constitutionalism cannot be seen as a unitary device whose properties can be a-historically derived from on an ideal level. It expresses heterogeneous and sometimes contradictory aspirations and passes through different forms and functions.

It is not the enthusiasm for the political state that renders Marx a proponent of the French Revolution.⁸⁷ Marx rather hopes for a transgression of democracy's boundaries. Since the *pouvoir constituant* raises the question of the extent to which people can be understood as authors of their own *legal conditions*, a dynamic process may occur. The inquiry needs to be extended to the totality of social relations, particularly with regard to the question of whether people can see themselves as authors of their own *living conditions*. In this way, Marx turns his reconstruction of the democratic constitution against the state. In the *Critique of Hegel's Philosophy of Right* and in his essay 'On the Jewish Question' the project of a 'true democracy'⁸⁸ is discernible, in which the alienated forms of rule return into society and 'man has recognised and organised his "own powers" as social powers, and, consequently, no longer separates social power from himself in the shape of *political power*'. (emphasis in the original)⁸⁹ However, Marx' perspective remains negative: it is not about the realisation of an ideal constitution, but simply about the negative potential to overcome relations of power and domination, which have become superfluous from the standpoint of social evolution.

3. Reflexivity

Machiavelli and Marx both embrace a strategic approach to constitutional issues. They are concerned with the mechanisms which allow one to contest asymmetrical power relations in specific contexts. This entails no commitment to an 'ideal type' of constitutionalisation, be it dualist, monist or societal. Though this line of thought is not connected to a fully fledged constitutional model, it embraces a peculiar normativity and restrains the available courses of action for destituent powers.

⁸⁷ Cf Marx' critique of political constitutionalism in Karl Marx, 'Zur Judenfrage (1843)' in *Marx-Engels-Werke Band 1* (Dietz-Verlag, 1972) 347–77.

⁸⁸ Karl Marx, 'Kritik des Hegelschen Staatsrechts (1843)' in *Marx-Engels-Werke Band 1* (Dietz-Verlag, 1972) 203–333, 232.

⁸⁹ Karl Marx, 'Zur Judenfrage (1843)' in *Marx-Engels-Werke Band 1* (Dietz-Verlag, 1972) 347–77, 370. Miguel Abensour unpacks the young Marx's 'democracy against the state' in detail (cf Miguel Abensour, *Democracy Against the State: Marx and the Machiavellian Moment* (Polity Press, 2011)), but he ignores that Marx in fact distinguishes between the constitution and the state and does not reject the constitution one-sidedly in the name of genuine democracy. However, Marx' cannot be seen as a strict anti-constitutionalist who was solely putting hope into popular insurrections. To the contrary, Marx' was in the 1840s mostly concerned with drawing lessons from the obvious failure of purely insurrectional tendencies in the French Left (cf Hal Draper, *Karl Marx's Theory of Revolution: The Dictatorship of the Proletariat* (Monthly Review Press, 1986) 58 ff.).

The contestatory logic itself—being driven by the *umori* of the *grandi* and the *plebs* in Machiavelli and the quest for human emancipation in Marx—sets inherent limits to what can count as destituent power. In our contemporary world, movements such as religious fundamentalists or right-wing populists may enact themselves in this vein. But however, they aim at exacerbating asymmetrical power relations. In many cases, they conceive of their ‘people’ as a closed ethnic community or at least as homogenous, pre-political entity. They lack the duplication of negativity: a destituent power would have to apply the negative implications to itself, ie, it must urge towards overcoming asymmetrical relations of power (instead of exacerbating them) and it would have to show an internal reflexivity in terms of self-questioning. Otherwise, destituent movements undermine their own promise.⁹⁰

The dialectic of constituent and constituted powers is still needed in order to safeguard such a minimal reflexivity. This marks a decisive difference to the most recent use of destituent power in the work of the Italian Philosopher Giorgio Agamben. For Agamben, ‘revolutions and insurrections correspond to constituent power, that is, a violence that establishes and constitutes the new law’, but, as he proceeds, ‘in order to think a destituent power we have to imagine completely other strategies, whose definition is the task of the coming politics’.⁹¹ Under coming politics, he imagines alternatives to the interplay of violence and power which is central to all forms of political constitutionalism. Agamben envisages a theory of the ‘inoperativity’ of law.⁹² Instead of engaging in the vicious cycle of violence that resonates in the exclusionary dimensions of modern law and politics, he gives examples where constitutions were not installed, founded or violently abolished, but simply ‘deactivated’, a strategy that he qualifies to be ‘neither destructive nor constituent’.⁹³ He refers to historical and theoretical examples, such as St. Paul who conceived of the relation between the messiah and the law as a deactivation, anarchist currents or Walter Benjamin’s critique of law. However, the radical exit from the interplay between constituent and constituted powers encounters the problem how to emerge and gain achievements in a world, which is coined by power and violence. As it is clear from the outset, Agamben’s account can refer to a huge tradition in the history of ideas and political movements which have always spread ideas about non-violently transforming the violence of law. They range from Anarchism to Jewish legal thought and

⁹⁰ The classical example for such a self-defeating mechanism is Schmitt’s conception of constituent power in his *Verfassungslehre*. Borrowing the primacy of constituent power from Rousseau and his identity-thesis, Schmitt collapses the constitutional moment into the acclamation of a political leader (Carl Schmitt, *Verfassungslehre* (1928) (Duncker & Humblot, 1993) 83).

⁹¹ Giorgio Agamben, ‘What Is a Destituent Power?’ (2014) 32(1) *Environment and Planning D: Society and Space* 65, 70.

⁹² *Ibid*, 69.

⁹³ *Ibid*, 71.

practice. The question remains if this—on the condition that it stands as a free-standing claim—does not amount in many cases to a *Don Quichotterie* which proves helpless in confronting hegemonic regimes.

IV. Conclusion

In this article, I argued that we should conceive of constituent power as destituent power in transnational contexts. This negative twist is embodied by counter-hegemonic communications which emanate from a plurality of sites and actors. While not recommending an ideal type of constitutionalisation, different institutional or non-institutional, political or legal mechanisms and courses of action can play out as destituent powers. They range from common political spaces of transnational social movements to the collisions of legal regimes.⁹⁴ Furthermore, we are able to re-contextualise the contestation from the nation-state level. Though it was shown that the nation-state collapses into a competition-state, alliances of states could assume a destituting role as well on the condition that they establish other, eg. post-neoliberal, modes of economic cooperation.⁹⁵

However, there seems to be a cunning of reason with a view to legality. In order to play out as destituent power, contestatory processes cannot solely rely on a narrow political rationality. At least from a certain point on, they will have to transform the subcutaneous *potentia* of counter-hegemonic communication into real *potestas*. They will have to come back to legal formalism in order to self-organise and not to collapse into a mere gesture of total politicisation or into an exodus that immunises itself against critique and reflexivity. If we understand destituent power in this vein, it does not allow for an exit from the ‘conflict of the constitution with itself’.⁹⁶

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⁹⁴ Cf the conflict between the WTO and the WHO on generic medicaments against AIDS in: Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25(4) *Michigan Journal of International Law* 999.

⁹⁵ The inter-state cooperation of developing countries within the WTO in recent years could be an example. However, it remains questionable if the WTO can provide policy autonomy for developing countries without ‘destituting’ the free trade bias. For a more optimistic view, cf Alvaro Santos, ‘Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico’ (2012) 52(3) *Virginia Journal of International Law* 551.

⁹⁶ Karl Marx, ‘Kritik des Hegelschen Staatsrechts (1843)’ in *Marx-Engels-Werke Band 1* (Dietz-Verlag, 1972) 203–333, 260.

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